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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 36

DUKE LEE LEWIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1965

CERTIORARI GRANTED JANUARY 31, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 811

DUKE LEE LEWIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6610

DUKE LEE LEWIS, a/k/a LEE D. LEWIS,
Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

[fol. 1]

Appellant's Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 65-130-F Crim.

THE UNITED STATES,

v.

DUKE LEE LEWIS a/k/a LEE D. LEWIS.

RELEVANT DOCKET ENTRIES

1965			
Apr.	23	1	Indictment returned
	26	2	Warrant for arrest issued
	28		FORD, D.J. Defendant appears before the Court without counsel—Court enters plea of not guilty—ordered to recognize in the sum of $5,000.00 with security—Recog. on file
	28		Clerk's notes filed in Court

1965			
	30		Warrant for arrest of defendant returned by Marshal, with service, dated April 27, 1965, filed
May	24	3	Appearance of Maynard G. Evans, Esq., Messrs. Klarfeld, Evans & Klarfeld for defendant filed
June	1	4	Motion to suppress evidence filed by defendant
	2	5	Defendant's brief in support of his motion to suppress evidence, filed
	3	6	Defendant's affidavit in support of his motion to suppress evidence, filed
[fol. 2]			
	7		FORD, D.J. Hearing on motion to suppress evidence filed by defendant, advisement.
	7		FORD, D.J. On defendant's motion to suppress evidence motion denied. Notices 6/8/65
	14	7	Court reporter's transcript of proceedings filed
	18		FORD, D.J. Waiver of Jury Trial filed in open Court, signed by the defendant, defendant's counsel, counsel for the Government and approved by the Court—defendant set to the bar to be tried without jury—trial begins —evidence—motion of the defendant to suppress evidence, renewed—defendant's affidavit in support of his motion to suppress evidence, filed—Government and defendant rests—motion denied—Court finds the defendant guilty on both counts—bail continued—disposition 7/12/65 at 11:00 A.M.,
	18		Clerk's notes filed in Court
	22		Receipt for money, evidence or other property—Matthew Seifer, Custodian of evidence, Boston, Mass., filed

1965	
July 12	FORD, D.J. Defendant sentenced to be imprisoned for a period of Five (5) years on Count I of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I. Sentence stayed ten (10) days pending appeal.
14	Judgment and commitment issued—copies to U.S. Marshal, Asst. U.S. Atty. E. L. Lee, [fol. 3] Deft. and Atty. for deft. Probation Office 7/14/65
21	Deft's Notice of Appeal filed. Copy to U.S. Atty.
21	Statement of docket entries and copy of N.A. delivered to Court of Appeals.
Aug. 6	Original pleadings and exhibits delivered to Court of Appeals.

IN THE UNITED STATES DISTRICT COURT

INDICTMENT—Returned April 23, 1965

The grand jury charges:

Count I

Duke Lee Lewis, a/k/a Lee D. Lewis, of Boston in the District of Massachusetts, on or about December 3, 1964, at Boston in said District, did transfer 31.16 grams, more or less, of marihuana, not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

Count II

Duke Lee Lewis, a/k/a Lee D. Lewis, of Boston in the District of Massachusetts, on or about December 17, 1964, at Boston in said District, did transfer 40.34 grams, more or less, of marihuana not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

MOTION OF THE DEFENDANT TO SUPPRESS EVIDENCE —Filed June 1, 1965

Now comes the Defendant, Duke Lee Lewis, a/k/a Lee D. Lewis and moves this Honorable Court to suppress any acts, admissions, and/or confessions made by him to agents of the Federal Bureau of Investigation prior to his indictment in the instant case and also moves to suppress in evidence any materials of any kind whatsoever, if any there be, taken or acquired from the home of the Defendant, known and numbered as 354 Walnut Avenue in that part of Boston known as Roxbury.

As grounds thereof the Defendant states that said evidence was procured under the following conditions:

1. The property was illegally seized from the Defendant, from his home and without a search warrant, said home being illegally entered by trick or deception.

2. The property was acquired illegally by means of deception from the Defendant by means of trickery and without a search warrant, from his home.

3. The property was illegally acquired by means of solicitation and enticement from the Defendant, from his home and without a search warrant.

4. The Defendant's constitutional rights were violated.

5. In order to properly seize or acquire the property used in connection with the indictment against the Defendant, the agent of the Federal Bureau of Investigation should have acquired a search warrant therefore, where the property was taken or acquired from the Defendant, and from his home.

6. The mere fact that an agent from the Federal Bureau of Investigation who disguises himself or poses as an ordinary citizen for the purpose of gaining entry into the home of the Defendant for the purposes of acquiring evidence against him and seizing property, does not excuse the [fol. 5] necessity for obtaining a search warrant.

By his Attorneys, Klarfeld, Evans & Klarfeld, By: S. Myron Klarfeld.

IN THE UNITED STATES DISTRICT COURT

DEFENDANT'S AFFIDAVIT IN SUPPORT OF HIS MOTION TO SUPPRESS EVIDENCE—Filed June 3, 1965

Now comes the Defendant in the above entitled matter and in support of his motion to suppress evidence states that the evidence he wishes to suppress is 31.16 grams, more or less, of marihuana acquired and taken from his home on or about December 3, 1964 and 40.34 grams, more or less, of marihuana acquired and taken from his home on or about December 17, 1964, and any and all admissions or utterances made in connection with the alleged transfer which may have taken place in or about his home on said December 3, 1964 and December 17, 1964. The Defendant reserves his rights under the Fifth Amendment of the Constitution notwithstanding this Affidavit.

Subscribed and sworn to under the pains and penalties of perjury this 3d day of June, 1965.

Duke Lee Lewis

June 3, 1965

I hereby certify that I have this day served a copy of this motion on Mr. Lee of the U. S. Attorney's office, 1107 Federal Building, Boston, Massachusetts.

Signed under the pains and penalties of perjury,

S. Myron Klarfeld

Motion denied
FORD, J.
June 7 '65

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

Transcript of Evidence—June 7, 1965

HEARING ON MOTION BEFORE FORD, D.J.

Boston, Massachusetts

Edward R. Cass, Sworn.

Direct examination.

By Mr. Klarfeld:

Q. Sir, will you tell us your name, please?
A. Yes, Edward R. Cass.
Q. And you are an agent of the Federal Bureau of Investigation?
A. No, sir, I am a federal narcotic agent.
Q. Whether or not you are the officer who on December 3, 1964 and December 17, 1964 obtained a quantity of marihuana from the defendant Mr. Lewis?
A. The question is am I? Yes, sir, I am.

The Court. The offense is laid on December 3, 1964 and then you answered on two occasions.
Mr. Lee. I believe Count 2—
The Court. Transferred to you on these two dates?
The Witness. Correct, sir.
The Court. What were they?

The Witness. December 3 and December 17.

The Court. This December 17 date does not refer to this marihuana you are talking about.

Mr. Lee. No, your Honor, that is Count 2 of the indictment.

The Court. All right. Go ahead, please.

Q. Mr. Cass, at some time prior to December of 1964 were you assigned by your superior to conduct an investigation for narcotics in violation of the narcotics laws in the Roxbury area of Boston?

A. Yes, I was.

Q. At the time of this assignment were you assigned the [fol. 7] name of the defendant as a possible suspect?

A. No, he was not assigned as a specific violator. I—

The Court. That is the answer. Next question.

Q. At some time during your investigation prior to the arrest of Mr. Lewis did the defendant Mr. Lewis become a suspect?

A. Yes, he did.

Q. Can you tell us when in time that was, Mr. Cass?

A. Yes, sir. It began in 1963.

Q. In 1963?

A. Yes, sir.

Q. On or about Thursday, December 3—

The Court. Were you on this investigation in 1963, did you say?

The Witness. I was aware of him as a suspect as far back as 1963, your Honor.

Q. On or about Thursday, December 3d, 1964, as alleged in the indictment, did you communicate by telephone with the defendant prior to going to his home?

A. On December 3d?

Q. Yes.

A. Yes, sir, I did.

The Court. What did you do? Communicate by telephone?

The Witness. With Mr. Lewis.

The Court. All right.

Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana?

A. It was.

Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are?

A. I did.

Q. And whether or not you represented yourself to the defendant on those occasions that you were one Pollock, operating a bar and grille, perhaps, in Rhode Island?

A. That's correct.

The Court. A bar?

The Witness. Yes, sir.

[fol. 8] Q. Did you inform the defendant on either the occasion of December 3d, 1964 or December 17th, 1964, when you spoke to him on the telephone or at his home, that you were a federal officer?

A. No, I did not.

Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass, did you have a search warrant for that purpose?

A. I did not.

Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the home of the defendant so far as the transfer of marihuana is concerned?

A. I did.

Q. When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the purpose of obtaining narcotics from him?

A. I did.

Q. On either occasion of December 3d or December 17th, Mr. Cass, did you identify yourself to the defendant as a federal agent?

A. I did not.

Q. On or about Thursday, December 17th, 1964, prior to going to the home of the defendant did you communicate with him by telephone?

A. I did.

Q. And was this communication also concerning the possibility of procuring some marihuana from the defendant?

A. It was.

Q. When you went to the defendant's home the second time, Mr. Cass, on December 17th, 1964, did you not have enough evidence to arrest him at that particular time and charge him with the same crime for which he is charged today?

A. I did.

Q. When you went to the defendant's home the second time had you not gone far enough with your investigation necessary to arrest the defendant and have him charged [fol. 9] with the particular crime for which he has been charged?

A. It is a matter of opinion. At that point I felt that the case required further investigation.

Q. Just my prior question, Mr. Cass, I asked whether or not when you went the second time you had sufficient evidence to arrest him and you said yes?

A. That's correct.

Q. Now I ask you, when you went the second time had you gone as far—

The Court. There is something in the answer to that question that might involve a question of law for the Court. He might think he had and I might think he did not have. The question as to whether it was a false arrest, whether or not the Court, after inquiring into the information, would decide the point. You are asking him for conclusions of law.

Mr. Klarfeld. I have no intention of doing that, your Honor. I am very sorry.

Q. When you went to the defendant's home the second time on December 17th, 1964 did you advise him of his right to have counsel before he answered any questions or entered into any conversation with you?

A. On the 17th?

Q. Yes.

A. No, sir, I did not.

Q. And on either visit, either the visit of December 3d or December 17th, did you advise the defendant of any of his constitutional rights insofar as they related to the matters with which he is charged today?

A. I did not.

Q. When, to the best of your recollection, after December 17th, 1964 did you arrest the defendant?

A. On the 27th of April, 1965.

Mr. Klarfeld. Thank you very much, Mr. Cass.

The Witness. Yes, sir.

The Court. Do you want to ask any questions?

Mr. Lee. Yes, your Honor.

[fol. 10] Cross examination.

By Mr. Lee:

Q. Mr. Cass, on December 3d, 1964 I believe you stated you had a telephone conversation with the defendant; is that correct?

A. That's correct.

Q. And did you go to his house subsequent to that conversation?

A. I did.

Q. What in fact was said by you and by the defendant in the telephone conversation that preceded your visit to his house?

Mr. Klarfeld. I pray your Honor's judgment.

The Court. You object on what ground?

Mr. Klarfeld. Your Honor, I don't think this is going to be germane to the purposes of the motion here. We are discussing today the entry into the man's house.

The Court. I am sure of that but I am going to allow the question.

Mr. Klarfeld. Will your Honor note my objection?

The Court. Yes. Go ahead. What did he say to you and what did you say to him?

The Witness. I called Lewis at his home and a man answered, said, "Hello."

And I said, "Duke?"

And Duke said, "Yeah."

And I said, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass."

And he said, "Yes." He told me, "I believe, Jimmy, I can take care of you."

I said, "Fine. I want about five bags."

He said, "Do you know where I live?"

I said, "No." He gave me his address as 354 Walnut Avenue and asked if I knew how to get there. I told him I wasn't sure. He gave me directions to come to his home and he said to come right over. That was the end of the conversation.

The Court. This was December of 1964, that talk?

[fol. 11] The Witness. That is correct, sir, December 3d.

Q. Directing your attention to December 17, 1964, did you have another conversation with the defendant at that time?

A. I did.

Q. What was said by you and by the defendant on that occasion?

A. The telephone conversation?

Q. Yes.

A. I called him and said, "Duke this is Pollack." I said, "I would like to get about six bags."

He said, "Fine, come on right over."

Q. Did you thereafter go to the defendant's home?

A. I did.

The Court. Was it on December 3d that you got this 31.16 grams? Or do you remember how much you got on that occasion?

The Witness. I bought five bags the first occasion for $50. They average about five grams per bag. Probably about 30 grams.

Q. At the time on December 17, 1964 when you went to the defendant's home, is that the occasion on which you

obtained 40 grams more or less of marihuana from the defendant?

A. Yes, sir.

Q. I believe you testified on direct examination that your purpose in visiting the defendant was to purchase marihuana; is correct?

A. Yes, sir.

Q. Did you attempt, at the time you visited Mr. Lewis, to induce him by any threat or coercion to sell marihuana to you?

Mr. Klarfeld. I pray your Honor's judgment.

The Court. That is a conclusion. He would have to decide what coercion was. Get into all the conversation and let the Court determine that issue.

Q. At the time you visited Mr. Lewis on December 3d—

The Court. What did you say to him when you went up there to his home on December 3d and got these five bags? What did he say to you?

[fol. 12] The Witness. I knocked on the door and Duke Lewis opened the door. I said, "Duke?"

He said, "Yeah."

I said, "I'm Jim."

He said, "Come on in." He said, "What is that nick name they call you?"

I said, "Pollack."

He said, "Okay, I got your stuff out on the porch."

We sat down in his living room. I said, "Is this stuff any good?"

He said, "Yes, Jimmy, my stuff is always nice."

I told him if I was satisfied with the quality of the marihuana I would do business with him on a regular basis but I would want a little break on the price.

He said, "What do you have in mind?"

I said, "I want a discount if I am going to buy regularly in quantity."

He said, "These first five bags will cost you $50. If you like it, next week I'll throw in an extra bag and let you have six bags for $50.

Q. Subsequent to this conversation what did you do?

A. He said, "Come on, I'll show you where the stuff is."

We walked down the hall to the front door and he started to open the door and an automobile drove by and the headlights shine on the porch. He shut the door until the car drove by and he opened the door again and he pointed over to, as you come out the door, to the left on the front porch.

He said, "See that package over there—"

Sorry, I forgot to tell you I paid him $50 before we left the living room.

He pointed to a package, a newspaper advertisement wrapped around a brown paper bag that had the five bags of Marihuana inside the bag. He pointed to it. I picked it up.

I said, "Okay, I'll see you in about a week."

[fol. 13] He said, "Okay." And that was the end of the conversation.

Q. On December 17, 1964 when you, pursuant to your telephone conversation, visited the defendant at his home did you have a conversation with him there?

A. Yes, sir, I did.

Q. Will you tell the Court what you said to him and he said to you?

A. I knocked on the door. He opened the door and we exchanged greetings and he said, "I've got your stuff right here."

I said, "I've got to use your bathroom."

He pointed it out. I walked down the hall through the apartment, went to the bathroom and walked back past the bedroom and living room doors that were open and I rejoined him at the front door.

He said, "You left your motor running."

I said, "There's a friend of mine waiting in the car."

He said, "Okay."

He handed me the package containing the six bags of marihuana and I paid him $50 and told him I would call him again in about a week.

Q. On either of these occasions, December 3 and December 17, 1964, did Mr. Lewis say anything to you that indicated he was reluctant to sell you the marihuana?

[Mr. Klarfeld rises.]

The Court. That calls for a conclusion again.

Mr. Lee. I withdraw the question.

Q. I believe you testified that you also saw the defendant on a third occasion and that was April 27, 1965?

[Mr. Klarfeld rises.]

A. That's correct.

Mr. Klarfeld. I pray your Honor's judgment to this.

The Court. This is the other marihuana in the garage, is it?

[fol. 14] Mr. Lee. I am not speaking about the marihuana, I am speaking about a conversation.

The Court. Go ahead. I don't know what you hope to prove.

Mr. Lee. Your Honor, I will withdraw the line of inquiry.

The Court. All right. The question is was there any violation of the Fourth Amendment with respect to this transfer we are talking about on December 3, 1964. That's all.

Mr. Lee. Your Honor, I have no further questions.

Redirect examination.

By Mr. Klarfeld:

Q. Mr. Cass, on both occasions, the 17th—December 3d and December 17th, you made these telephone calls to the defendant's home before going?

A. That's correct.

Q. And on neither occasion did you advise the defendant that if he permitted you to come onto his premises he might be waiving any of his constitutional rights?

A. That's correct, I did not.

Mr. Klarfeld. Thank you. That's all I have, your Honor.

IN THE UNITED STATES DISTRICT COURT

RULING OF COURT ON MOTION TO SUPPRESS EVIDENCE —June 7, 1965

Take notice that in the above-entitled case Judge Ford has made at Boston, Mass., on June 7, 1965 the following notation on the following motion:

"June 7, 1965 On defendant's motion to suppress evidence, motion denied. /s/ Ford, D.J."

Date June 8, 1965

Paul V. Traverse, Clerk. By Grace V. Flood, Deputy Clerk.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT

Excerpt From Transcript of Trial—July 12, 1965

RENEWAL OF MOTION TO SUPPRESS EVIDENCE AND DENIAL THEREOF

The Court. Now, what I am presented with here is a renewal of the motion of the defendant to suppress evidence; right?

Mr. Klarfeld. Yes, your Honor.

The Court. That motion will be denied, Mr. Counsel.

There is one observation I want to make before I make the final finding. It relates here, before the grounds were assigned, that certain material was taken or acquired, as I read it, from the home of the defendant at 354 Walnut Avenue. Of course with respect to December 17th there was a manual transfer, according to the evidence, of the marihuana, and the other occasion it was practically, and I find that there was a manual transfer because of the circumstances in which it appeared where the marihuana that was admitted in evidence was located and Agent Cass was directed to pick it up. That the Court finds the equivalent, of course, to a manual transfer. In other words noth-

ing was taken or seized by the agent of the government. In both cases it was transferred voluntarily, the Court finds, by the defendant.

Mr. Klarfeld. Would the record reflect my request, to protect the rights of my client, on your Honor's ruling [and] in denying the motion to suppress the evidence?

The Court. Yes. There is no objection to that, of course.

Mr. Klarfeld. [And] my objection to your Honor's reference to the transfer as a manual transfer.

The Court. Yes. I will make a note of the objection to that. That is my finding with respect to that.

• • • • • • •

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—July 12, 1965

On this 12th day of July, 1965 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court of two offenses in violation of Title 26, USC Section 4742(a), in that he did transfer 31.16 grams, more or less, of marihuana (Count I), and 40.34 grams, more or less, of marihuana, (Count II), not in pursuance of a written order of the persons to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate as charged in counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5)

years on Count 1 of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I.

It is Adjudged that

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Francis J. W. Ford, United States District Judge.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 21, 1965

Name and address of Appellant: Duke Lee Lewis, a/k/a Lee D. Lewis, 354 Walnut Avenue, Roxbury, Massachusetts.

Name and address of Appellant's attorney: Klarfeld, Evans & Klarfeld, 20 Pemberton Square, Boston, Massachusetts.

Offence: It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court of two offenses in violation of Title 26, USC Section 4742(a), in that he did transfer 31.16 grams, more or less of marihuana (Count I) and 40.34 grams, more or less, of marihuana, (Count II), not in pursuance of a written order of the persons to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, as charged in counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Five (5) years on Count I of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I.

The defendant is presently on bail.

I, the above named Appellant Duke Lee Lewis, a/k/a Lee D. Lewis appeal to the United States Court of Appeals [fol. 18] for the District of Massachusetts from the above stated judgment.

For the Appellant by his duly authorized agent and attorneys,

Klarfeld, Evans & Klarfeld, By: S. Myron Klarfeld.

[fol. 27]

Appellee's Appendix

IN THE UNITED STATES DISTRICT COURT

Stenographic Transcript of Trial—June 18, 1965

APPEARANCES:

Edward J. Lee, Esq., for the government.

S. Myron Klarfeld, Esq., for the defendant.

Court Room No. Three
Federal Building, Boston

• • • • • • •

The Clerk: United States v. Duke Lee Lewis. You are now set to the bar to be tried.

Mr. Lee: Your Honor, may I request that the waiver be read into the record? I understand the defendant is considering an appeal of his motion.

The Court: It is filed in the case. That is sufficient.

Mr. Lee: Does your Honor wish to hear an opening on the part of the government?

The Court: No. I know the charge and we have discussed it the other day and I am ready. Put in your testimony. Have you something?

Mr. Klarfeld: Yes, your Honor, in accordance with our discussion I would like to represent my motion to suppress and I have it and the affidavit.

The Court: So as to protect your rights you object and I will overrule it. Also make an objection when the evidence is adduced.

Mr. Klarfeld: The reason, sir, I presented it—

The Court: Your rights will be fully protected, too.

Mr. Klarfeld: Thank you very much.

• • • • • • •

[fol. 39] Edward R. Cass, Sworn.

Direct examination.

By Mr. Lee:

Q. Will you state your name, please?

A. Edward R. Cass.

Q. Your business address, Mr. Cass?

A. 1425 Post Office Building, Boston, Massachusetts.

Q. Are you employed?

A. Yes, sir.

Q. By whom are you employed?

A. The Federal Bureau of Narcotics, United States Treasury Department.

Q. Were you employed by that bureau in December of 1964?

A. Yes, sir.

Q. In the course of your official duties did you have occasion to be in Boston at that time?

A. I did.

Q. At some time prior to December 3, 1964 did you have occasion—

The Court: Are you from Boston originally?

The Witness: Yes, sir.

The Court: Where were you working before you came to Boston on this case?

The Witness: I had been in Boston since June of 1963.
The Court: Go ahead.

Q. At some time prior to December 3d, 1964 did you have occasion to receive some funds in the course of your official duties?

A. Yes, I did.

Q. What were those funds?

A. They were referred to as official advance Funds, funds that are issued to narcotic agents for the purchase of narcotics evidence.

Q. Did you have such funds in your possession on December 3, 1964?

A. I did.

Q. Again directing your attention to that date, December 3, 1964, did you have occasion then on that day to make a telephone call?

A. I did.

Q. Approximately what time did you make this call?

A. About 11 p.m.

Q. What was the number called?

A. HI 5-3641.

[fol. 40] Q. To whom was that number, HI 5-3641, listed, if you know?

A. Lee Duke Lewis at 354 Walnut Avenue.

Q. Where is 354 Walnut Avenue?

A. In Boston, the Roxbury district.

Q. At the time you dialed that number did you say something?

A. I did.

Q. What did you say, what did you first say, the first thing you said?

A. I said, "Is Duke there?"

Q. Did anyone answer your call?

A. Yes.

Q. What did that person say?

A. He said, "This is Duke."

Q. Did you have any further conversation with the person who answered at that time?

A. I did.

Q. Was there anyone else present when you made this call?

A. Yes.

Q. Who was that person?

A. Narcotics Agent Richard Smith.

Q. Was Mr. Smith doing anything at the time that you could observe?

A. He was.

Q. What was he doing?

A. He was monitoring the telephone conversation by placing his ear next to the receiver.

Q. Is it your testimony, then, that the receiver was between your ear and Mr. Smith's ear on this occasion?

A. That's right.

Q. After this call did you do anything?

A. Yes.

Q. What did you do?

A. I drove to 354 Walnut Avenue.

The Court: Was that the only conversation you had, "This is Duke," and then you drove?

The Witness: No, sir, there was more conversation.

Mr. Lee: I was bringing it in later but I will bring it out now.

The Court: Do it your own way. It will be brought out by defense, anyway. You try your own case, Mr. Lee.

Mr. Lee: Thank you, your Honor.

[fol. 41] Q. Is it your testimony you drove to 354 Walnut Avenue?

A. Yes, sir.

Q. What did you do when you arrived at 354 Walnut?

A. I got out of my car and knocked at the door of the first floor apartment.

Q. Did someone answer your knock?

A. Yes, sir.

Q. Who was that person? Was it a man?

A. It was a man.

Q. Do you see that person present in the court this morning?

A. Yes, I do.

Q. Will you point him out, please?

A. It was Mr. Lewis, sitting behind the brass rail to my right.

Q. Is that Mr. Duke Lee Lewis, also known as Lee D. Lewis?

A. Yes.

Mr. Lee: Your Honor, may the record reflect the witness properly identified the defendant?

The Court: I will leave out the word "properly."

Mr. Lee: Excuse me. Has identified the defendant.

Q. Did you have any conversation with Mr. Lewis at that time?

A. Yes, I did.

Q. First of all, before you answer that, at the time Mr. Lewis answered the door did you say anything to him?

The Court: What was the conversation at that point? What did Mr. Lewis say to you and you say to Mr. Lewis?

The Witness: I knocked on the door and Mr. Lewis opened the door and I said, "Duke?"

He said, "Yeah, come on in."

I went into the apartment, into a hallway. He closed the door behind me and I said, "I'm Jimmy."

He said, "What is that nickname they call you?" And I said, "Pollack."

He said, "Oh, yeah, come on."

I followed Duke down the hall into his living room and he told me to have a seat. I sat down and he asked me where I was from and I told him Rhode Island.

[fol. 42] And he said, "What do you do?"

I said, "I've got a saloon down there."

And Duke said he had a saloon here in town, too.

And he said, "Your stuff is out on the porch, Pollack."

And I said, "Is it nice stuff, Duke? Is it clean and manicured?"

Duke said, "My stuff is always nice."

And I said, "If I'm satisfied I might become a regular customer but I would want a little break."

And he said, "What do you have in mind?"

And I said, "I want a discount if I come back regularly."

And he said, "This first five bags will cost you $50 but if you come back I'll throw in another bag and let you have six bags for $50."

And I said okay and I paid him $50 and he said, "I'll show you where your stuff is."

And I followed him back down the hallway to the front door and he opened the door and he said, "It is down at the end of the porch."

At that point a car came by and he shut the door and said, "Wait until this car goes by."

Then he opened the door and pointed to the end of the porch and said it was wrapped in the newspaper and he stood in the doorway while I walked to the end of the porch and picked up the package. There were a couple of advertisements from a discount store, Sherbros, wrapped around a white paper bag and I picked the package up and walked back to the center of the porch, to the front door, and told Duke, "I'll see you in about a week."

He said, "Any time."

And I walked down the steps, got into my car and drove away.

Q. At the time you said you gave Mr. Lewis $50 at 354 Walnut Street, in the apartment, what denominations were [fol. 43] those bills, if you remember?

A. I think it was a 20, and three tens.

Q. Directing your attention to your earlier testimony, Mr. Cass, when you said you placed the telephone call on that same date to HI 5-3641, the phone you knew to be listed to Mr. Lewis, and a voice answered, "Yes, this is Duke," when you arrived at 354 Walnut Avenue and after the conversation you had with the defendant, were you then able to recognize the voice who answered your earlier phone call?

A. Yes, I was.

Q. And whose voice did you recognize that to be?

A. Duke Lewis.

Q. Can you relate now what you said to Mr. Lewis and he said to you in the earlier phone call?

A. Yes, I can.

Q. By the way, Mr. Cass, what time did you place that phone call?

A. At about 11 p.m.

Q. What time was it when you arrived at 354 Walnut Street?

A. Between 11.15 and 11.30.

Q. Would you relate the conversation in the earlier phone call, Mr. Cass?

A. Yes. I said, "Duke?"

And he said, "This is Duke."

And I said, "My name is Jimmy Pollack and a friend of ours told me you have some pretty good grass."

And he said, "Yes, he told me about you, Pollack. Yes. I can take care of you."

I said, "I want to pick up about five bags."

And he said, "Do you know where I live?"

And I said, "No."

And he gave me his address, he said, "I live at 354 Walnut Avenue."

And he asked if I knew how to get there and I said no and he gave me directions, told me how to get there from where I was calling. And I said—I acknowledged the directions and he said, "Okay, come on right over, it should take you about 15 minutes."

[fol. 44] Q. How long have you been a narcotics agent?

A. Approximately 13 years.

Q. Based on your experience as an agent are you able to state what is meant by the term "grass"?

A. Yes, sir, grass is a slang term, a street term for marihuana.

Q. At the time you testified you were at 354 Walnut Avenue and during the conversation in which you paid Mr. Lewis $50 and you subsequently obtained a package from him, from his porch, did you tender to Mr. Lewis a written order form on an order form issued by the Secretary of the Treasury authorizing the transfer of marihuana?

Mr. Klarfeld: I will stipulate he didn't do it, your Honor.

The Court: What is that?

Mr. Klarfeld: I will stipulate that the defendant did not.

The Court: The stipulation is that no order form was given.

Mr. Lee: Do you so stipulate, that no order form was given?

Mr. Klarfeld: Yes, your Honor.

The Court: You got no order form to give him, did you?

The Witness: No, sir.

The Court: All right.

Q. Mr. Cass, after you obtained the package wrapped in newspaper from Mr. Lewis at 354 Walnut Avenue, what did you next do?

A. I got into my car and drove to Howard Johnson's stand where I met Agent Smith and I examined the contents of the package. I found that inside the newspaper wrapping was a white paper bag and in the paper bag were five envelopes and I examined the contents of the envelopes in the presence of Agent Smith and we both initialed each article of the container, the envelopes, the newspapers, [fol. 45] and the bag, and I drove to the Federal Narcotics Bureau where, in the presence of Agent Smith, I locked the entire exhibit in a safe.

Q. Now, Mr. Cass, did there come a time when the package, the newspaper advertisements and the paper bag were removed from that safe?

A. Yes, sir.

Q. When was that?

A. The following day, December 4, in the presence of Agent Smith I removed the exhibit from the safe, weighed the contents of each of the envelopes and sealed the entire exhibit in a lock seal envelope and, with Agent Smith, I delivered the envelope to the United States chemist in Boston.

Q. Was that on the same date, the delivery to the United States chemist?

A. Yes, sir, the same date that I weighed and sealed it.

Mr. Klarfeld: Your Honor, I think I can stipulate again that the exhibits that have been heretofore referred to, iden-

tified by Mr. Kravitz, will be similarly identified by Agent Cass.

The Court: Then you stipulate that the packages that have been referred to in the previous testimony were contained in these envelopes. Do you need anything further?

Mr. Lee: No, your Honor. Just an identification or stipulation—

The Court: You can mark them all as exhibits.

Mr. Lee: I have them already marked, your Honor.

The Court: No, you haven't.

Mr. Lee: For identification, your Honor. I stand corrected.

The Court: There is a difference between an exhibit and an exhibit for identification. Give them to the Clerk and he will tell you what to do about them. They are now admitted in evidence and now we call them exhibits. It is an important distinction. Now they are in evidence.

[fol. 46] Mr. Lee: I was about to offer them, your Honor.

[Government's Exhibits 1, 2, 3 and 4 for Identification received in evidence.]

Mr. Klarfeld: Will the record reflect my objection to it being offered into evidence?

The Court: Yes. Counsel for defense objects to the admission of this evidence in this case.

Q. Mr. Cass, did there come a time when you placed another call to HI 5-3641?

A. Yes, sir.

Q. When was that?

A. On December 17, 1964.

Q. Approximately what time on December 17th, 1964?

A. A little past midnight, about 12.15 a.m.

Q. Did someone answer your call?

A. Yes, sir.

Q. Did you recognize the voice of the person who answered?

A. I did.

Q. Who was that person?

A. Duke Lewis.

Q. Was there a conversation?

A. Yes.

Q. Will you tell the Court what you said to Mr. Lewis and what he said to you on that occasion?

A. Yes, sir. I said, "Duke?"

He said, "Yes."

I said, "This is Pollack. I want to pick up six of those bags for $50."

He said, "Okay, I can take care of you. Come on right over."

Q. After this conversation did you do anything?

A. Yes, sir.

Q. What did you do?

A. I drove to 354 Walnut with Agent Smith, parked my car in front of the house and knocked on the door and Duke opened the door and I told him I wanted to use his bathroom and he told me where it was, at the far end of the house, and I walked through the house and went into the bathroom, came back through the house, rejoined Duke at the front door.

He said, "I've got your stuff right here."

[fol. 47] And I said, "Is it as good as the last stuff?"

And he said, "My stuff is always good."

And I paid him $50 and he opened the door. He said, "You left your motor running."

And I told him that there was a friend of mine waiting in the car, that he is okay.

And he said, "Okay, I'll see you later."

And I left the house—

The Court: No, no. "I have your stuff right here," and you paid him $50. What did he do?

The Witness: I'm sorry. He handed me a brown paper bag fastened with a rubber band, and then I paid him $50.

I left the house and got back in my car and, with Agent Smith, I drove to the Federal Narcotics Bureau and examined the contents of the paper bag, found six manila envelopes. I examined the contents of the envelopes and we both initialed all the containers, the envelopes and the paper bag and I locked the entire exhibit in a safe at the Narcotics Bureau.

Q. Mr. Cass, did there come a time when those six packages and the brown paper bag with the rubber band were taken from the safe at the Narcotics office?

A. Yes, sir, on the same date, in the presence of Agent Smith, I removed the exhibit from the safe, removed the contents from the envelopes, weighed them and sealed them in an evidence envelope which was sealed by me in the presence of Smith and we both signed the envelope and on that same date I delivered it to the United States chemist in Boston.

Q. Mr. Cass, directing your attention to the conversation on the telephone prior to your visit to 354 Walnut Avenue December 16, 1964, was there anyone present during the conversation?

A. Yes, sir, Agent Smith monitored the call by placing his ear next to the receiver.

Q. At the time when you were in Mr. Lewis' apartment at 354 Walnut Avenue and you gave him $50 and he gave [fol. 48] you six envelopes, did you at that time give him a written order on a form authorized by the Secretary of the Treasury—

Mr. Klarfeld: I will stipulate there was no order, your Honor.

Q. During the conversation in the apartment, Mr. Cass, did you say anything with respect to the quality of the marihuana which you received on December 3d, 1964?

A. I referred to it, yes, sir.

Q. What did you say?

A. I asked him—this is on the 17th—I asked him if this stuff, referring to the marihuana I bought on that date, was as good as the last stuff.

Q. Did Mr. Lewis reply to your comment on this occasion?

A. Yes, sir, he did.

Q. What did he say?

A. He said, "My stuff is always good."

Mr. Lee: I have no further questions of this witness, your Honor.

The Court: Do you want to inquire, Mr. Counsel?

Cross examination.

By Mr. Klarfeld:

XQ. Mr. Cass, prior to December 3, 1964, when had you commenced your investigation in this particular area so far as it relates to the defendant?

A. In 1963.

XQ. Can you give us a month?

A. It would be the latter part of 1963. I don't believe I can pin it down. It would be sometime from July on.

XQ. And when you commenced your investigation in the general area of the defendant's residence, would it be proper to say that you assumed the identity of Jim the Pollack as early as December of 1963?

A. No, sir.

XQ. When after December of 1963 can you place it, then, that you assumed this particular identity?

A. December of 1964.

XQ. December of 1964?

A. Yes, sir.

[fol. 49] XQ. And do I understand you correctly that it was in December of 1964 that you assumed this identity so far as the investigation in the general area for narcotics is concerned?

A. I'm afraid I misunderstood your question.

XQ. Well, sometime in December of 1963, Mr. Cass, you were assigned to this area for the purpose of conducting an investigation for narcotics by a supervisor?

A. No, that is not correct, either.

XQ. Well, at some time—

The Court: Why don't you ask him when and then he can answer it. When were you assigned to this area, if you were? He can always say no, when you talk about a specific date.

XQ. When you were assigned to investigate narcotics activities in this area?

A. In the area of Boston? In June of 1963.

XQ. And at sometime prior to making the telephone conversation of December 3d to the defendant Lewis, you had become acquainted with a friend of his?

A. That's correct.

The Court: Become acquainted with whom?

Mr. Klarfeld: A friend of the defendant's.

XQ. Can you tell us his name?

A. Yes. Richard Gold.

XQ. Did you, at some time after meeting Richard Gold, ascertain that he was a friend of the defendant, Mr. Lewis?

A. Yes, I did.

XQ. Was it through Richard Gold that you made your contact with the defendant Lewis, or did you use the name Richie to refer to Richard Gold in your conversation with him of December 3d?

A. No.

XQ. When you spoke with the defendant on December 3d, was there some conversation about Richie, meaning Richard Gold?

A. No.

Mr. Klarfeld: May I have just a moment, your Honor?

[A brief pause.]

[fol. 50] XQ. Previously you were asked the conversation you had with the defendant on December 3d and I believe you testified yourself, after Duke answered the telephone on December 3d, you said, "Duke?"

And Duke said, "Yes."

You said, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass."

Is that, in substance, what the conversation was?

A. Yes, sir, that's correct.

XQ. Was that friend to whom you referred Richie Gold?

A. Yes, sir.

XQ. So that you did, then, make your contact with the defendant through this Richie Gold?

The Court: That asks for a conclusion.

XQ. Well, then, was it Richard Gold that put you in touch with the defendant?

A. I put myself in touch with the defendant.

The Court: That is another conclusion you asked. In order to get at these conclusions, you might ask some detail, and so forth. He said he put himself in touch with the defendant.

XQ. Well, then, it is correct that this friend, this mutual friend that you referred to, is Richard Gold?

A. That's correct.

XQ. Referring to Richard Gold, how long had you been acquainted with him prior to making your contact with the defendant? Just roughly.

A. Oh, at least six months.

XQ. Did he also know you as the Pollack or Pollack?

A. Yes, he did.

The Court: What was that question?

XQ. Did he also know Agent Cass to be Pollack, by that identity.

A. Yes.

XQ. And whether or not, Mr. Cass, you inquired of Mr. Gold if he could put you in touch with somebody from whom you could procure marihuana?

[fol. 51] Mr. Lee: Your Honor, I object. I don't see the relevancy.

The Court: Yes or no.

A. Yes, I did.

The Court: There is nothing wrong with that. The government uses informers to detect criminals and those in illegal enterprises, without question.

XQ. Is that how you had the occasion to call the defendant Lewis?

A. Yes.

XQ. Mr. Cass, at any time prior to your conversation with the defendant on December 3d and up to and including the time you arrested him, did you inform the defendant that you were a federal officer?

A. No, sir.

XQ. And on either occasion of December 3d or December 17th did you have a search warrant to enter the premises at 354 Walnut Avenue, the home of the defendant?

A. I did not.

XQ. And on either occasion, December 3d or December 17th, Mr. Cass, did you, prior to gaining entrance to the home of the defendant, advise him of his constitutional rights insofar as any waiver of his rights is concerned?

A. No, sir.

Mr. Lee: Your Honor, may the question be specific?

The Court: That's all right. He did not. Go ahead. These questions will be more pertinent after an arrest but not before, these questions he is asking now.

Mr. Lee: Yes, your Honor. I am just trying to get him to identify the right that he is seeking to question the witness about.

The Court: Those questions don't mean a thing in the light of the circumstances because Lewis wasn't under arrest.

XQ. On either occasion, Mr. Cass—

The Court: We don't get to Escobedo yet, do we?

Mr. Klarfeld: No, your Honor.

[fol. 52] The Court: Lewis wasn't under arrest when these various talks were had with him with respect to procuring this marihuana.

XQ. In any event, Mr. Cass, you did not advise him on either December 3d—

The Court: That's right, he did not.

Mr. Klarfeld: All right.

XQ. Your purpose in making the telephone call, Mr. Cass, on December 3d and on December 17th, was to secure the purchase of marihuana from the defendant?

A. It was to investigate an alleged violation of the narcotics laws and the purchase of drugs was one avenue of investigation. That wasn't the sole and specific—

XQ. But part of your purpose in calling him was to see if you could purchase narcotics from the defendant?

A. It was to present him with an opportunity if it seemed appropriate, yes.

The Court: Talking about warning of constitutional rights when these purchases were made, that would lead to an absurd situation. If he told Lewis, "You don't have to say anything or give me anything unless you want to," I wonder whether the agent would get anywhere at that point.

Mr. Klarfeld: I agree with your Honor.

The Court: You must agree because it is perfectly obvious.

Mr. Klarfeld: Yes, your Honor. I don't wish to make that contention.

The Court: I was thinking that would be absurd, if an agent goes around telling his name and he says, "I am an agent of the Internal Revenue Service. I want to buy 50 packages of marihuana," would he ever get any?

Mr. Klarfeld: Thank you, your Honor.

XQ. Mr. Cass, it is correct to say, then, that your phone calls and your visits to the home of the defendant were at [fol. 53] least in anticipation of acquiring marihuana?

A. It was to investigate the possibility and the acquiring of marihuana was one possible result of my inquiry and investigation, yes, sir.

XQ. That is why you went there, to see if you could get some?

A. I went there to investigate if there was a possible narcotics violation and in the course of the conversation I might, especially through conversation or observe marihuana on the premises, and if I did I might find it appropriate to attempt to get the evidence of the sale.

The Court: He asked—I think I will let it stand. You asked him why he went there.

XQ. Your telephone conversation, Mr. Cass, was about purchasing grass, as you call it?

A. No. Initially I said—

XQ. If your answer is no, please stop there because that is all I asked for.

A. I can't answer that question yes or no.

XQ. All right. When you called him on the telephone on December 3d, 1964, did you say to him, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass"?

A. Yes, sir, that's what I said.

XQ. By grass, did you refer to marihuana?

A. I did.

XQ. Then you did call and ask him about marihuana?

A. That's right.

The Court: There is no question about it. It is perfectly obvious.

XQ. When you went to his home, you went there in anticipation of purchasing marihuana as a result of this phone call?

A. I would have to answer the same way. This was one possibility that occurred to me. It was not the only one.

The Court: There was a possibility he would be able to purchase marihuana. It is obvious. Nothing wrong with that.

[fol. 54] Mr. Klarfeld: No, your Honor. May I try one more time?

XQ. When you went to the home of the defendant on December 3d and December 17th, did you not go there for the purpose of obtaining narcotics from him?

A. This was one possibility. My prime purpose was to investigate.

The Court: Yes. It is perfectly obvious.

XQ. Is your answer yes?

A. My answer isn't yes.

XQ. Is your answer no?

A. No, sir. I am trying to answer your question.

The Court: You may qualify it. You would give the same answer.

XQ. I want to show you a page, Mr. Cass—

The Court: Wait a minute, Mr. Cass, counsel has a right to ask you—

XQ. I am going to show you a document—

The Court: That is a hearing on the motion to suppress?
Mr. Klarfeld: Yes, sir.

XQ. "When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you go there for the purpose of obtaining narcotics from him—" meaning the defendant, and what is your answer, please?
A. The answer was, "I did."

The Court: That was one of your purposes, at least, was it not?
The Witness: Yes, sir.

XQ. That answer was correct, was it not?
A. It was not complete.
XQ. Was it correct?

The Court: As far as it went, he says. It was not complete.

A. As far as it went it was correct but it wasn't complete.
XQ. You didn't go there to buy tea, did you?
A. That was one possibility that occurred to me.

[fol. 55] The Court: Don't quibble over it. He went there to buy grass and he bought it. No question about it.

XQ. When you went the second time, on December 17th, Mr. Cass, did you, on December 17th, have enough evidence to arrest the defendant at that particular time and charge him with the same crime for which he is charged here today?

Mr. Lee: I object.
The Court: Strike it out. He wouldn't know whether he had enough evidence and it is not up to him to make a decision.
Mr. Klarfeld: On December 17th, your Honor. This is the second time.

The Court: He doesn't decide whether or not there was enough evidence. That is up to the United States Commissioner. He does not have to answer a question like that.

Mr. Klarfeld: He did before, your Honor.

The Court: The question is, and the facts and so forth show that he had enough evidence. You can argue that way.

Mr. Klarfeld: I don't think I have anything else, your Honor.

The Court: Step down.

Mr. Lee: May I ask two questions, your Honor?

The Court: Yes, indeed.

Redirect examination.

By Mr. Lee:

Q. I believe you testified on direct examination that prior to your visit to Mr. Lewis on December 3d, 1964, you had a conversation with Mr. Gold. Then I believe defense counsel asked you if that was the occasion for your visit to Mr. Lewis. Mr. Cass, prior to December 3d, 1964, had you received any information from any source other than Mr. Gold indicating the possibility that the defendant—

[Mr. Klarfeld rises.]

[fol. 56] The Court: We won't go into that. Strike it out. If Gold turned out to be an informer, he has a perfect right to use an informer.

Mr. Lee: Yes, your Honor.

The Court: Were you here at the charge yesterday in the Sagansky case?

Mr. Lee: Yes, your Honor.

The Court: You heard all I had to say. There is no question about that.

Mr. Lee: Your Honor, earlier I was under the assumption that you had admitted Government's Exhibits 5, 6, 7 and 8. These—

The Court: They were all marked as exhibits. The defense counsel said there were no objections. Were they all marked?

The Clerk: No, your Honor, only the first ones.

Mr. Lee: May 5, 6, 7 and 8 be admitted, your Honor?

The Court: Certain of them have reference to the first count and the remainder have a reference to the second count.

Mr. Lee: Yes, your Honor, 5, 6, 7 and 8 refer to the second count.

The Court: They may be marked as exhibits.

Mr. Klarfeld: I have no objection to them being marked. The only objection I had was when he offered them for admission.

Mr. Lee: I am offering them now.

Mr. Klarfeld: I will object to them as being offered.

The Court: We were talking about the admissibility. You object to that, and properly so, and your objection is noted in the record. You are objecting to preserve his rights in the court up above, if he goes there.

[Government's Exhibits Nos. 5, 6, 7 and 8 for Identification received in evidence.]

Mr. Klarfeld: And my objection, for the record.

[fol. 57] Mr. Lee: I have no further questions of this witness, your Honor.

The Court: Step down.

Mr. Lee: Your Honor, may we approach the bench?

The Court: Yes, come up.

[Conference at the bench.]

The Court: Come up, Mr. Smith.

RICHARD G. SMITH, Sworn.

The Court: Take the stand, Mr. Smith. Your statement is that what he would testify would be corroborative of what the agent already has testified to?

Mr. Lee: Your Honor, Mr. Smith will testify to the same—

The Court: What is his name and address, first?

Direct examination.

By Mr. Lee:

Q. Will you state your name, please?

A. Richard G. Smith, 1423 Federal Building, Boston, Massachusetts.

Q. What is your employment, Mr. Smith?

A. Narcotics agent by the United States Treasury Department, Bureau of Narcotics.

Q. Were you present on December 3—first of all, do you know Mr. Cass?

A. Yes.

Q. Who is he?

A. An agent for the Bureau of Narcotics.

Q. Were you present on December 3, 1964 when Mr. Cass placed a telephone call to HI 5-3641?

A. Yes, sir, I was.

The Court: And what Mr. Cass testified to here as to the conversation over the telephone on that date and on December 17th, 1964, would you corroborate those?

The Witness: Yes, I would, your Honor.

The Court: He is turned over now to the defendant if he wishes to cross-examine.

Mr. Klarfeld: No questions, your Honor.

[fol. 58] The Court: That is, when you make a statement that the witness is merely corroborative of what went before, defense should always have the opportunity to cross-examine him if he wishes. Your statement, "It is merely corroborative, may it please the Court" and have him sworn and I turn him over to defense for cross-examination.

Ninety-nine times out of a hundred the defense will not cross-examine but at times they do. That is the purpose of corroboration and turning him over and that is done here and counsel, Mr. Klarfeld, says he waives or does not desire to cross-examine the witness and consequently, Mr. Smith, you may step down.

BOTH SIDES REST

Mr. Lee: Your Honor, I have no further evidence. The government rests.

The Court: Now, Mr. Klarfeld.

Mr. Klarfeld: The defendant will rest, your Honor.

The Court: Now, what I am presented with here is a renewal of the motion of the defendant to suppress evidence; right?

Mr. Klarfeld: Yes, your Honor.

The Court: That motion will be denied, Mr. Counsel.

There is one observation I want to make before I make the final finding. It relates here, before the grounds were assigned, that certain material was taken or acquired, as I read it, from the home of the defendant at 354 Walnut Avenue. Of course with respect to December 17th there was a manual transfer, according to the evidence, of the marihuana, and the other occasion it was practically, and I find that there was a manual transfer because of the circumstances in which it appeared where the marihuana that was admitted in evidence was located and Agent Cass was directed to pick it up. That the Court finds the equivalent, of course, to a manual transfer. In other words nothing was taken or seized by the agent of the government. In [fol. 59] both cases it was transferred voluntarily, the Count finds, by the defendant.

Mr. Klarfeld: Would the record reflect my request, to protect the rights of my client, on your Honor's ruling in denying the motion to suppress the evidence?

The Court: Yes. There is no objection to that, of course.

Mr. Klarfeld: In my objection to your Honor's reference to the transfer as a manual transfer.

The Court: Yes. I will make a note of the objection to that. That is my finding with respect to that.

Government rests, and do you intend to present any evidence, Mr. Klarfeld?

Mr. Klarfeld: No, I do not.

The Court: Then you rest your case?

Mr. Klarfeld: I do.

COURT'S FINDING

The Court: The Court, on the evidence presented here, finds the offenses laid down in Counts 1 and 2 of the indictment have been proved beyond a reasonable doubt and defendant—

Mr. Lee: Your Honor, may I approach the bench?

The Court: Go ahead, if you want to say something.

[Conference at the bench.]

The Court: I find the defendant guilty on both counts.

[Conference at the bench.]

The Court: Same bail. Disposition July 12th, Same bail until July 12th.

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

On November 2, 1965, this cause came on to be heard and was fully heard by the Court, Honorable Bailey Aldrich, Chief Judge, and Honorable William H. Hastie (by designation) and Honorable Edward M. McEntee, Circuit Judges, sitting.

[fol. 61]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6610.

DUKE LEE LEWIS, a/k/a LEE D. LEWIS,
defendant, appellant,

v.

UNITED STATES OF AMERICA, appellee.

Appeal from the United States District Court for the District of Massachusetts.

Before ALDRICH, *Chief Judge,* HASTIE* and MCENTEE, *Circuit Judges.*

S. Myron Klarfeld, for appellant.

Edward J. Lee, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.,* United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—November 10, 1965

PER CURIAM. Defendant, convicted of selling marihuana to a government agent who had misrepresented his identity, claims an unlawful search and seizure because, thus misled by the agent, he invited him to his home and there made the sales. The happy days for law violators that this claim would produce are not to be. This is not a case of a government agent gaining access for an apparently proper purpose in order to seize surreptitiously evidence of a prior crime, *Gouled* v. *United States,* 1921, 255 U.S. 298, but is one in which the agent was invited for precisely the [fol. 62] purpose for which he went. Short of entrapment,

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*Sitting by designation.

not here maintainable, defendant can no more assert that he would not have opened the door to the agent than he can assert that he would not have made the sale. His reliance upon *Escobedo* v. *United States*, 1964, 378 U.S. 478, is quite misplaced. *United States* v. *Pasquinzo*, 6 Cir., 1964, 334 F.2d 74.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—November 10, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Enter: Aldrich, Ch. J.

[fol. 63] Thereafter, on November 12, 1965, mandate was stayed.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 811—October Term, 1965

DUKE LEE LEWIS, Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—January 31, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.